Supreme Court, U.S.
FILED
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No._____

In The
Supreme Court of the United States

JAMES E. PIETRANGELO, II, *Petitioner,*

v.

U.S. DISTRICT COURT VERMONT, *Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES E. PIETRANGELO, II
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Pro Se

QUESTIONS PRESENTED

Whether a suit for declaratory and injunctive relief from an unconstitutional administrative act or policy of a U.S. District Court Judge is barred by sovereign immunity?

If such a suit is not barred, may it be heard by the District Court Judge's fellow District Judge?

What level of constructive denial of access to the courts offends the Constitution? Is singling out and arbitrarily treating a litigant so offensively that a reasonable person would be deterred from visiting the courthouse unconstitutional?

May a non-party's motion to dismiss, with an affidavit containing allegations prejudicial to a party, be allowed to stay in the record and be considered by the courts when the party prejudiced has moved to strike it?

PARTIES TO THE PROCEEDINGS

Petitioner (Plaintiff-Appellant below) is James E. Pietrangelo, II.

Respondent (Defendant-Appellee below) is the U.S. District Court for the District of Vermont.

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PETITION FOR A WRIT OF CERTIORARI

James E. Pietrangelo, II respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (1a-4a) is unreported, as is that of the District Court (5a-6a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment provides: "Congress shall make no law...abridging the freedom of speech...or the right of the people peaceably to...petition the government for a redress of grievances." See U.S. Const. amend. I. The Fifth Amendment provides: "No person shall be...deprived of life, liberty, or property, without due process of law." See U.S. Const. amend. V. Section 292(b), 28 U.S.C., provides: "The chief judge of a circuit may, in the public interest, designate and assign temporarily any district judge of the circuit to hold a district court in any district within the circuit." See 28 U.S.C. § 292(b). Section 455(a), 28 U.S.C., provides: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." See 28 U.S.C. 455(a).

STATEMENT

A. Introduction

Petitioner, James E. Pietrangelo, II, is a veteran attorney licensed in Ohio in 1997 and in Vermont in 2005. He has represented countless clients, through practice with law firms and the federal government, and solo practice. He served three tours in the U.S. military and served in law enforcement. He has no criminal record and is a strong supporter of rule of law and democracy. In April 2005, Pietrangelo filed a Section 1983 suit on his own behalf against the municipality in which he resided, alleging that several corrupt customs or policies of the municipality had led to violations of his civil rights on several occasions. In October 2005, Pietrangelo "ratcheted-up" his suit, both moving in the federal suit for an injunction of certain municipal actions and contacting the Vermont State Police to have the actions investigated. Prior to this "ratcheting-up," Pietrangelo had regularly visited the U.S. District Court Vermont courthouse in Burlington, Vermont, both in furtherance of his Section 1983 suit and a separate FOIA suit he was litigating, and his own legal education and awareness of judicial proceedings—and those visits had been completely without incident. However, immediately after his "racheting-up," Pietrangelo's visits dramatically changed. Specifically, court security officers began uniquely treating Pietrangelo as a security threat—pursuant to what one officer later admitted to Pietrangelo was a "policy"—even though Pietrangelo was still as professional and legally-compliant as he had been before the "ratcheting-up." The court security officers began conspicuously escorting Pietrangelo wherever he went in the small courthouse, including the bathroom, during his visits. On one occasion, the court security officers even completely denied Pietrangelo access to the courthouse. The court security officers' treatment of Pietrangelo was

different than that which they accorded other *similarly*-situated attorneys, litigants, and members of the public visiting the courthouse.

Having done nothing wrong to legally warrant such treatment, Pietrangelo immediately complained in writing about the treatment to the chief judge of the U.S. District Court Vermont, the Honorable William K. Sessions, III. Pietrangelo complained that the treatment was arbitrary and apparently in retaliation for Pietrangelo's increased anti-corruption efforts, and asked Judge Sessions to investigate the matter. Judge Sessions did not respond to Pietrangelo, nor did the treatment stop. Consequently, Pietrangelo filed suit in the U.S. District Court Vermont, seeking to declare as unconstitutional and enjoin the unwarranted policy and treatment. Pietrangelo named as Defendants the U.S. District Court itself and the unknown court security officers who were implementing the policy. Pietrangelo named the U.S. District Court itself on the theory that the policy and treatment were administrative acts of Judge Sessions in his official capacity as Chief Judge.

Pietrangelo's suit was assigned to the Honorable J. Garvan Murtha, Judge Sessions' fellow jurist on the U.S. District Court Vermont bench. After denying, by a mere text order, Pietrangelo's motion for Judge Murtha to recuse himself for the appearance of bias, Judge Murtha *promptly* ruled—at the pleading stage—that Pietrangelo's suit against the U.S. District Court was barred by sovereign immunity, and that his suit against the unknown court security officers had failed to state a claim. See 5a-6a. Pietrangelo timely appealed Judge Murtha's judgment to the Second Circuit.

Oral arguments in Pietrangelo's appeal were heard on March 13, 2007, by a Second-Circuit panel that, unbeknownst to Pietrangelo beforehand, included none other than Judge Sessions himself—the very official whose policy was at issue—sitting by designation. Judge Sessions recused himself from the actual hearing of arguments in

Pietrangelo's appeal, but sat and heard arguments in the other scheduled appeals for nearly an hour with the two other Second-Circuit judges (Honorables Joseph M. McLaughlin and Richard C. Wesley) of the panel, right up until Pietrangelo's argument. Pietrangelo was flabbergasted to see Judge Sessions on the panel. Judges McLaughlin and Wesley immediately issued a summary order the next day, on March 14, 2007, affirming Judge Murtha's dismissal. See 1a-4a. In their order, Judges McLaughlin and Wesley did not discuss or even mention many of the substantial arguments in Pietrangelo's appellate brief. The Judges also failed to address much less grant Pietrangelo's appellate motion to strike certain evidence improperly before them.

B. The Errors

The Second Circuit's affirmance was clearly erroneous. First, Judge Murtha had an obvious conflict of interest or appearance of bias. Second, Pietrangelo's claim against the U.S. District Court was not barred by sovereign immunity because it fell within the well-established exception of declaratory and injunctive relief against unconstitutional federal acts. Third, Pietrangelo's claim against the unknown court security officers *was* cognizable under multiple constitutional theories. Fourth, Pietrangelo was denied a fair hearing on appeal.

i. Recusal

Title 28 U.S.C. § 455(a) clearly required Judge Murtha's recusal. Both the Supreme Court and the Second Circuit have held that a chief judge is ultimately responsible for the treatment by court security officers of attorneys, litigants, and members of the public while they are in a district courthouse. See U.S. v. Smith, 426 F.3d 567, 576 (2d Cir. 2005), citing Sheppard v. Maxwell, 384 U.S. 333, 358

(1966) ("While the Marshals Service and Secretary of DHS are charged by Congress with protecting the federal courts . . . the Supreme Court has made clear that 'courtroom and courthouse premises are subject to the control of the court.'" Thus, Judge Sessions was and is responsible, in his official administrative capacity, for the allegedly unwarranted policy and treatment against Pietrangelo. Pietrangelo named the U.S. District Court itself and not Judge Sessions individually as Defendant because the Supreme Court has "repeatedly recognized that the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder,"[1] Karcher v. May, 484 U.S. 72, 78 (1987); see, also, Hafer v. Melo, 502 U.S. 21, 25 (1991); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 544 (1986); Libby v. Marshall, 833 F.2d 402, 405 (1st Cir. 1987) (where injunctive relief is sought that would require an official to exercise their official powers in certain ways, the suit is an official-capacity suit), and "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690 n. 55 (1978). Consequently, in hearing Pietrangelo's suit, Judge Murtha was reviewing an administrative policy of his fellow jurist, Judge Sessions. Given that fact, and the fact that the U.S. District Court Vermont only has three judges (Judge Murtha, Judge Sessions, and Magistrate Judge Niedermeier) to begin with, a

[1] Indeed, every court of appeals, including the Second Circuit, to address the issue of whether declaratory and injunctive relief may be directed at a government official in his *individual* capacity has answered in the negative. See Frank v. Relin, 1 F.3d 1317, 1327 (2d Cir. 1993); Scott v. Flowers, 910 F.2d 201, 213 (5th Cir. 1990); Community Mental Health Servs. v. Mental Health and Recovery Bd. Serving Belmont, Harrison & Monroe Counties, No. 04-3587, slip op. at 11 (6th Cir. Sept. 14, 2005); Ameritech Corp. v. McCann, 297 F.3d 582, 587 (7th Cir. 2002); Feit v. Ward, 886 F.2d 848, 858 (7th Cir. 1989); Del Raine v. Carlson, 826 F.2d 698, 703 (7th Cir. 1987).

reasonable person would question Judge Murtha's impartiality. See 28 U.S.C. § 455(a); Liteky v. U.S., 510 U.S. 540, 548 (1994). The "rule of necessity" did not apply to still allow Judge Murtha to hear the case, because Judge Murtha was intrinsically disqualified by the nature of his relationship to the matter being reviewed in the first place—not because Pietrangelo had indiscriminately sued anyone[2]—and there were other judges in neighboring districts who could have heard the case. See 28 U.S.C § 292(b).

ii. Sovereign Immunity

The district court clearly had jurisdiction to hear Pietrangelo's suit. Federal jurisprudence, including Supreme Court precedence, has long—all the way back to the founding of this Nation—allowed non-money-damages suits against the federal government to declare and/or enjoin unconstitutional federal acts. See Whitman v. Dep't of Transportation, 126 S.Ct. 2014, 2015 (2006) (*Per Curiam*) ("Another statute, however—a very familiar one—grants jurisdiction to the federal courts over 'all civil actions arising under the Constitution[.]'") (FAA employee sued DOT claiming that FAA was arbitrarily drug-testing him and in retaliation for speech); Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 74 (2001) ("injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"); Davis v. Passman, 442 U.S. 228, 242 (1979); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) ("Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of the officers of the Government, it is proper that the courts have the power to grant relief against those actions."); Larson, 337 U.S. at

[2] Pietrangelo did not sue Judge Murtha. Nor did he indiscriminately sue the U.S. District Court because, as already explained, an official-capacity suit is against the entity, not the individual official.

691 n. 11; Bell v. Hood, 327 U.S. 678, 684 (1946) (Supreme Court long affirmed its practice "to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); U.S. v. Lee, 106 U.S. 196, 208-209, 218-220 (1882); Marbury v. Madison, 1 Cranch 137, 178 (1803); Jorden v. National Guard Bureau, 799 F.2d 99, 109 (3rd Cir. 1986); Arvanis v. Noslo Engineering Consultants, Inc, 739 F.2d 1287, 1292-1293 (7th Cir. 1984) ("A narrow exception to sovereign immunity is made for suits seeking injunctive relief for the very reason that no claim on the treasury is involved."); Clark v. U.S., 691 F.2d 837, 841 (7th Cir. 1982) (declaratory action not barred by sovereign immunity because declaratory relief not a burden on government). In fact, the Second Circuit itself recently decided that a claim against a U.S. District Court (probation office) and two District Court judges for an allegedly unconstitutional administrative action was *not* barred by sovereign immunity. See Dotson v. Griesa, 398 F.3d 156, 179 (2d Cir. 2005), *cert. denied*, 2006 U.S. LEXIS 4530 (2006) (". . . we conclude that Dotson's claim for equitable reinstatement is not barred by sovereign immunity."). Pietrangelo sought only declaratory and injunctive relief against the U.S. District Court Vermont to declare unconstitutional and enjoin its policy and treatment against him. See 12a.

iii. Stating a Claim

Pietrangelo clearly stated a constitutional claim against both the U.S. District Court Vermont and the unknown court security officers. It is black-letter law that "[w]hen considering a motion to dismiss pursuant to Rule 12(b)(1), the court must take all facts alleged in the complaint as true and draw all reasonable inferences in favor

of plaintiff,"[3] see, *e.g.*, Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000), and a plaintiff may establish the actual existence of subject-matter jurisdiction through extra-pleading material. See 5A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1350 at 213 (2d ed. 1990). Based on Pietrangelo's sworn complaint (see 7a-13a) and opposition-to-motion-to-dismiss affidavit (see 14a-16a)—both of which were in the record before dismissal—not only should the allegations stated in the "Introduction" to this Petition brief have been established as facts, but it should have been established that: other attorneys, litigants, and members of the public observed and were made aware of Pietrangelo's being treated like a security threat; the treatment continues to this day; Pietrangelo has suffered and continues to suffer humiliation, embarrassment, anxiety, and harm to his reputation because of the treatment; Pietrangelo stopped going to the courthouse in furtherance of his legal education and judicial awareness, because of the treatment; Pietrangelo stopped going to the courthouse in furtherance of his litigation, because of the treatment; Pietrangelo stopped engaging in, or toned down, legitimate, peaceful, lawful criticism of government, because of the treatment, out of fear that such criticism would lead to further arbitrary adverse action; and Pietrangelo refrained from seeking legal work from prospective clients and from associating with other attorneys, because of the treatment; the treatment and its underlying policy were/are arbitrary, retaliatory, and not applied to similarly-situated attorneys, litigants, and members of the public.

Together, these facts make out a *prima facie* case for several constitutional violations, including a First-Amendment "denial of access to courts" claim, see, *e.g.*, Huminski v. Corsones, 386 F.3d 116 (2d Cir. 2004); Monsky

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[3] The District Court dismissed pursuant to Rule 12(b)(1), see 1a-2a, and so that is the standard discussed.

v. Moraghan, 127 F.3d 243 (2d Cir. 1997), *amended opinion* at 1997 U.S. App. LEXIS 36158 at *13 (2d Cir. 1997), *cert. denied*, 1998 U.S. LEXIS 4926 (1998) ("no doubt . . . hostile action toward a litigant so offensive as to effectively drive the litigant out of a courthouse and thereby become the functional equivalent of a denial of access"); a First-Amendment retaliation claim (the policy was in retaliation for Pietrangelo's Section 1983 suit and anti-corruption efforts), see Perry v. Sindermann, 408 U.S. 593 (1972); a First Amendment "chill" claim, see Laird v. Tatum, 408 U.S. 1 (1972); an equal-protection "class of one" claim, see Willowbrook v. Olech, 528 U.S. 562 (2000); a procedural-due-process "stigma plus" foreclosure claim, see Goss v. Lopez, 419 U.S. 565 (1975); and a "shocks the conscience" substantive-due-process claim. See Rochin v. California, 342 U.S. 165 (1952).

iv. The Appeal

The Second Circuit's hearing of Pietrangelo's appeal was simply fundamentally unfair. The appellate panel on which Judge Sessions had just sat simply did not have the requisite impartiality to review dismissal of a challenge to his own administrative policy. In fact, so biased was the panel, that they considered evidence which was improperly before them. A NON-party's *motion to dismiss* (different from the Defendant U.S. District Court Vermont's motion to dismiss which the district court granted) from the district-court case was forwarded by Defendant U.S. District Court Vermont with the record to the Second Circuit, and the panel allowed that motion to remain on appeal even though it had been from a NON-party and even though Pietrangelo had moved to strike it both at the district-court level and on appeal. This was fundamentally unfair because attached as an exhibit to the forwarded NON-party motion was an affidavit containing serious but false allegations against

Pietrangelo. Although these allegations did not go to the sufficiency of his claims but to their weight, they obviously—by their seriousness—affected the panel's decision. Yet, Pietrangelo had never had an opportunity to test or rebut the affidavit's allegations at the district-court level and thus on appeal, not only because he had moved below to strike the affidavit and the motion to which it was attached and the district court had failed to rule on that motion before dismissal, but because the district court had dismissed the case at the pleadings stage. In effect, the panel reached the factual merits (*i.e.*, justification) of the policy to affirm dismissal of the case, without ever allowing Pietrangelo to factually challenge (*i.e.*, with rebuttal and evidence) the policy, even though that is why he filed suit in the first place. He filed suit to be able to prove that the policy and treatment were arbitrary, not merely to claim they were. The panel tried the merits of the case, even though the merits had never been reached below.

REASONS FOR GRANTING THE PETITION

The Petition should be granted for five simple but powerful reasons. First, the district court's decision and the Second Circuit's affirmance of that decision were incorrect as a matter of law and fact. Conspicuously treating one attorney like a criminal whenever he comes into the courthouse, while giving free rein to all other attorneys, simply because the one attorney is vigorously fighting a corruption suit against local powers, is wrong. Second, the underlying policy and treatment complained of strike at the heart of democracy. No rights are more important in a democracy than the right of a law-abiding citizen to complain about government corruption, and the right of a law-abiding citizen, when government harms him, particularly in retaliation for complaining about corruption, to seek remedy in the courts. When even one citizen is

deprived of those rights, all suffer. Thus, when a district court and then court of appeals rules incorrectly in a case involving (alleged) government corruption and free-speech retaliation, this Court, as the Defender of the Constitution, cannot avoid acting to correct the mistake.

Third, that this Court cannot avoid acting to correct a district-court/court of appeals mistake involving quintessential rights is even more true when federal-court personnel, including judges in their administrative capacities, are directly involved in the alleged violation of those quintessential rights. Democracy is completely lost when federal judges start retaliating against citizens for exercising their rights, and then other federal judges ignore that retaliation.

Fourth, the appearance of judicial bias diminishes citizens' respect for, and faith in, their judiciary and the rule of law. This is amply illustrated in Iraq, where civil strife and revenge killings are rife because citizens have no faith in the integrity of the Iraqi court system to be impartial. As the supreme U.S. court, this Court has a compelling supervisory interest in ensuring that lower courts act with the strictest impartiality, fairness, and probity, and are seen to so act. The district court and Second Circuit's treatment of Pietrangelo's case smacked of unfairness. At least a Second-Circuit panel comprised of judges other than Judge Sessions should have heard the appeal.

Finally, the questions presented by Pietrangelo's case and appeal are novel ones involving judicial administration, and their resolution by this Court will provide guidance to federal courts in the future, especially in this time of war and heightened security.

CONCLUSION

Abraham Lincoln once said: "It is . . . as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." See First Annual Message, 7 Richardson, *Messages & Papers of the Presidents*, 3245, 3252. For the reasons stated above, the Petition for Certiorari should be granted.

Respectfully submitted,

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JAMES E. PIETRANGELO, II

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Mar. 14, 2007)

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 0.23 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)", UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14th day of March, two thousand and seven.

Present: HON. JOSEPH M. McLAUGHLIN,
HON. RICHARD C. WESLEY,
*Circuit Judges,**

JAMES E. PIETRANGELO, II,

Plaintiff-Appellant,

- v - (06-3004-cv)

U.S. DISTRICT COURT VERMONT AND
UNKNOWN SECURITY PERSONNEL,

Defendants-Appellees.

Appearing for
Plaintiff-Appellant: *James E. Petrangelo, II*, pro se, South Burlington, VT

Appearing for
Defendant-Appellee: *John P. Tavan*, Assistant United States Attorney for the District of Vermont (Thomas D. Anderson, United States Attorney, Carol L. Shea, Assistant United States Attorney, *on brief*)

Appeal from the United States District Court for the District of Vermont (Murtha, J.).

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* The Honorable William K. Sessions III, Chief Judge of the United States District Court for the District of Vermont, recused himself from consideration of this case. Thus this case is decided by the two remaining members of the panel pursuant to Section 0.14(b) of the Local Rules.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be **AFFIRMED.**

Plaintiff-appellant James Pietrangelo, *pro se,* appeals from the May 17, 2006 judgment of the district court granting the government's motion to dismiss. We presume the parties' familiarity with the underlying facts and procedural history, which we reference only when needed to explain our decision.

Mr. Pietrangelo argues that Judge Murtha, as one of three judges serving the District of Vermont, should have recused himself because of an alleged bias in favor of the defendant, the United States District Court for the District of Vermont. A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), a decision which we review for an abuse of discretion, *In re Drexel Burnham Lambert, Inc.,* 861 F.2d 1307, 1312 (2d Cir. 1988). This case involves routine questions of sovereign immunity and allegations of unconstitutional actions taken by federal officers. On this record, we cannot conclude as a matter of law that the district court judge abused his discretion by not recusing himself.

Mr. Pietrangelo contends that the district court erred by dismissing on the grounds of sovereign immunity. Well-established principles of sovereign immunity bar suit against the United States unless it consents to be sued, the existence of such consent being a prerequisite for jurisdiction. *See United States v. Mitchell,* 463 U.S. 206, 212 (1983). Consent to suit "must be 'unequivocally expressed' in statutory text, and cannot simply be implied." *Adeleke v. United States,* 355 F.3d 144, 150 (2d Cir. 2004)

(citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992)). Mr. Pietrangelo alleges his constitutional rights were violated by the United States District Court for the District of Vermont. No express statutory waiver of sovereign immunity exists for such a claim. Thus, the sovereign immunity of the United States bars Mr. Pietrangelo's suit.

We also agree with the district court that Mr. Pietrangelo has not pleaded sufficiently a constitutional violation against unknown security personnel.

All outstanding motions are hereby DENIED and the judgment of the district court is AFFIRMED.

For the Court
Thomas Asreen, Acting Clerk

/s/ Lucille Carr
By:

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JAMES E. PIETRANGELO, II	:	
	:	
v.	:	Civil No. 1:05CV311
	:	
U.S. DISTRICT COURT VERMONT and UNKNOWN COURT SECURITY PERSONNEL	:	

RULING ON MOTION TO DISMISS
(Paper 15)

(Filed May 17, 2006)

The *pro se* plaintiff is an attorney who claims to have recently experienced "unconstitutional incidents" while visiting the United States District Court in Burlington. He has sued the Court and unnamed court security officers ("CSOs") as a result of several visits during which the CSOs monitored his activities and deterred him from personally appearing in the Clerk's Office to file papers or interacting with court staff.

He does not allege he has been barred from the Court altogether, or has been unable to file his paperwork. He seeks an order enjoining CSO scrutiny or monitoring of his activities, which he asserts has caused him embarrassment, humiliation, and anxiety. *See* Complaint (Paper 1) at para. 10.

The government has moved to dismiss the complaint for lack of subject matter jurisdiction.

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer,* 510 U.S. 471, 475 (1994). In this case, sovereign

immunity protects the court and its personnel from this suit. *Id.*

The plaintiff seeks an injunction barring unnamed CSOs from subjecting him to what he characterizes as arbitrary scrutiny when entering the courthouse. He maintains this request saves his complaint from dismissal. *See generally* Plaintiff's Opposition (Paper 17). Nevertheless, the plaintiff does not allege that he has been denied access to the court or facts suggesting a right to conduct his court business without scrutiny by security personnel. In short, he has failed to set forth any constitutional violation as a result of the several incidents described in his complaint. *Cf. Huminski v. Corsones,* 396 F.3d 53, 77 (2d Cir. 2005) (indicating state courts have the authority to ensure the security of their facilities).

On the facts alleged, the plaintiff has failed to state a claim within the Court's jurisdiction. *See FDIC v. Meyer,* 510 U.S. at 475 ("Sovereign immunity is jurisdictional in nature."). The Complaint is DISMISSED without prejudice.

The Motion to Dismiss filed on behalf of the United States Marshals Service (Paper 10), plaintiff's Motion to Strike (Paper 11) and Motion for Default Judgment (Paper 12) are DENIED as moot.

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 17th day of May, 2006.

/s/ J. Garvan Murtha
J. Garvan Murtha
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

JAMES E. PIETRANGELO, II	)	
Plaintiff,	)	JUDGE
v.	)	CASE NO. 5-cv-311
U.S. DISTRICT COURT VERMONT	)	
&	)	
UNKNOWN COURT SECURITY PERSONNEL	)	
Defendants.	)	

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (with Jury Demand)

(Filed Nov. 28, 2005)

1. Jurisdiction of this Court arises under 28 U.S.C. §§ 1331, 1343(a), and 2201; and F.R.C.P. 65.

2. Plaintiff had, prior to the incidents complained of below, regularly entered the Federal Building Courthouse in Burlington, Vermont, to conduct business relating to two separate lawsuits he is litigating in U.S. District Court Vermont. Specifically, Plaintiff regularly visited the U.S. District Court Clerk's Office, the U.S. Attorney's Office, and, on occasion, Judge Niedermeier's courtroom, chambers, as well as Court conference room 250. As an attorney, Plaintiff also had occasionally entered the Federal Building Courthouse and visited the Clerk's Office and one of the courtrooms while a trial was in session, in order to further educate himself on the practice of law by reading recent pleadings and viewing courtroom proceedings.

During all of these visits, Plaintiff had complied with all laws and courthouse rules, and was peaceable, respectful, and courteous. During all of these visits, Plaintiff was allowed by District Court security to visit the various offices and rooms he visited, unescorted and unmonitored, and with the same level of scrutiny accorded other attorneys.

3. One of the lawsuits that Plaintiff is litigating and for which Plaintiff had regularly visited the Federal Building is a lawsuit against a wealthy local municipality for the allegedly illegal and unconstitutional conduct of its police department. At least two police officers are individually named as defendants in the case. A local business, who allegedly conspired with the police department, is also named as a defendant.

4. On or about October 11, 2005, the Chief Security Officer for the Federal Building Courthouse or U.S. District Court Vermont called Plaintiff and accused Plaintiff of having "breached security" and of having "made a mistake" by personally speaking with a court secretary regarding a preliminary injunction motion that Plaintiff had filed in connection with the lawsuit against the municipality. When Plaintiff peaceably and respectfully protested his innocence, the Chief Security Officer then said and threatened, solely because of Plaintiff's protestation of his innocence, "if you are going to be that way, I am going to refer the matter to the U.S. Marshals."

5. Plaintiff immediately reported the incident, via letter, to Judge Jerome Niedermeier, with whose secretary Plaintiff had spoken. Plaintiff asked Judge Niedermeier to investigate the situation, to vindicate him in light of the Chief Security Officer's threat.

6. Plaintiff visited the Federal Building once or twice more after the Chief Security Officer's threat without incident.

7. Then, on or about October 26, 2005, when Plaintiff next visited the Federal Building, in order to file a paper with the Court Clerk's Office in the lawsuit against the municipality, he was treated differently than he had ever been treated before. First, Plaintiff noticed that the unknown security guard who passed him through the metal detector, and whom Plaintiff had seen and chatted with numerous times before, was unusually red in the face upon seeing Plaintiff, and in fact appeared livid with Plaintiff, although the guard said nothing. Plaintiff wondered if this individual was in fact the Chief Security Officer about whom Plaintiff had complained to Judge Niedermeier. Plaintiff said nothing to the guard about the guard's apparent reaction. As usual, Plaintiff was peaceable, respectful, and courteous to the guard, and complied with all laws and rules. When Plaintiff indicated that he was going to the Clerk's Office to file something, the guard told Plaintiff to hold on, that he could not go up yet, even though Plaintiff had never been stopped before from going up. The guard then picked up the phone and called someone, and said to that person words to the effect that Plaintiff was going to the Clerk's Office and needed to be monitored there. The guard then allowed Plaintiff to enter the elevator. Plaintiff went into the Clerk's Office, said hello, and indicated that he had a paper to file. At that point, a security guard walked up to the Office and looked in at Plaintiff, and then left. Plaintiff then asked the assistant Clerk about filing a complaint with Chief Judge Sessions about the treatment he had just received from the guard(s). As Plaintiff was peaceably, respectfully, and

courteously talking with the assistant Clerk, another security guard came into the office. He leaned against the counter directly next to Plaintiff. Plaintiff thanked the assistant Clerk for his information, said good day, and left.

8. On or about October 27, 2005, Plaintiff again visited the Federal Building. This time, he was there to serve two copies of an appeal reply brief upon the U.S. Attorney's Office in a case that Plaintiff is litigating on appeal with the Second Circuit and in which the U.S. Attorney represents the appellee. In his certificate of service in the reply brief, Plaintiff indicated that he would be personally hand-delivering the brief to the U.S. Attorney's Office, as he had done numerous times in the past with other papers in that particular case, without incident. After the security guard passed Plaintiff through the metal detector, he asked Plaintiff where he was going. Plaintiff said the U.S. Attorney's Office to serve a brief. As usual, Plaintiff was peaceable, respectful, and courteous to the security guard, and complied with all laws and rules. The guard told Plaintiff to hold on. The guard then called someone and told him that Plaintiff was going to the U.S. Attorney's Office. After hanging up, the guard told Plaintiff that he could not go up, even though Plaintiff had never been stopped before from going up, and that he would have to leave the reply brief with him. When Plaintiff asked the guard why he was being given special security treatment, the guard acknowledged the special security treatment, did not explain further, and said that he was just following orders. Plaintiff then left.

9. The security guards' special treatment of Plaintiff in these two incidents, coupled with the Chief Security Officer's threat, indicate that the U.S. District Court Vermont and its court security personnel have a policy to

treat Plaintiff specially or differently from other similarly-situated attorneys, litigants, and members of the public.

10. Such treatment and policy have caused Plaintiff to be treated like a criminal and/or security threat, when he has been and is neither, and has caused him embarrassment, humiliation, and anxiety, particularly because Plaintiff plans on practicing law in Burlington. Moreover, such treatment and policy have been so offensive as to prevent and deter Plaintiff from visiting the Court in furtherance of his cases and legal education. Moreover, such treatment and policy does and will effectively impair Plaintiff's ability to practice law and be gainfully employed as an attorney in Burlington.

11. On or about October 27, 2005, Plaintiff sent a letter to Chief Judge William Sessions, asking him to investigate and remedy the unwarranted and unjust "special treatment" Plaintiff was receiving. To date, Plaintiff has not received a reply from either Judge Sessions or Judge Niedermeier, nor, upon information and belief, has the special treatment stopped.

12. Upon information and belief Defendant U.S. District Court Vermont is responsible overall for the treatment that the security guards accord individuals, including litigants, attorneys, and general members of the public, entering the Federal Building Courthouse.

13. The security guards' special treatment of Plaintiff, and the apparent underlying policy to so treat Plaintiff, were/are arbitrary and without legal justification, and violated Plaintiff's rights under the U.S. Constitution to be free from discriminatory and arbitrary government action and deprivation and to access the courts.

14. The security guards' special treatment of Plaintiff, and the apparent underlying policy to so treat Plaintiff, were/are also retaliation for Plaintiff's protected free speech, to wit, his protestation of his innocence with the Chief Security Officer, and, upon information and belief, his lawsuit against the municipality, and thus violated Plaintiff's free speech rights under the U.S. Constitution.

15. Upon information and belief, Defendant U.S. District Court Vermont has authorized, condoned, and/or ratified the security guards' special treatment of Plaintiff, and thus has violated Plaintiff's constitutional rights as described above.

16. Even if Defendants were to stop their arbitrary special treatment of Plaintiff, they could easily repeat it at any time with Plaintiff again or other litigants/attorneys/members of the public, making their constitutional violations capable of repetition yet evading review.

Jury Demand

Plaintiff demands a trial by jury on all issues triable by a jury.

Prayer for Relief

WHEREFORE, Plaintiff asks this Court for an order declaring Defendants' treatment of, and policy in respect of, Plaintiff, unconstitutional, and an order enjoining Defendants from carrying out such treatment and policy in the future; plus costs and attorney's fees of this action, and any other relief that this Court deems just and proper.

Dated at Burlington, Vermont this 28th day of November 2005.

Respectfully submitted,

/s/ James E. Pietrangelo, II
JAMES E. PIETRANGELO, II
P.O. Box 9231
South Burlington, Vermont 05407
Plaintiff *Pro Se*

VERIFICATION

The undersigned, being duly sworn, states that he is the Plaintiff herein, and has read the foregoing pleading and the facts stated therein are true to the best of his knowledge, belief, and information.

/s/ James E. Pietrangelo, II
JAMES E. PIETRANGELO, II

Sworn to before me on this 28th day of November 2005.

/s/ Justin F. Ryea
NOTARY PUBLIC

Justin F Ryea
NOTARY PUBLIC
MY COMMISSION EXPIRES
2/10/07

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

JAMES E. PIETRANGELO, II *Plaintiff,* v. **U.S. DISTRICT COURT, *et al.*** *Defendants.*	**JUDGE J. GARVAN MURTHA** **CASE NO. 1:05CV311**

AFFIDAVIT OF JAMES E. PIETRANGELO, II IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT U.S. DISTRICT COURT'S MOTION TO DISMISS

(Filed May 8, 2006)

I, JAMES E. PIETRANGELO, II, being duly sworn, state as follows:

1. I am the Plaintiff in the above-titled action.

2. When I am in the U.S. Courthouse, Burlington, Vermont, I am always conspicuously followed and monitored. As soon as I enter the lobby, a court security guard invariably publicly radios a guard somewhere else, or tells another guard in the lobby, where I am going and to be on that floor to monitor me. When I, on occasion, necessarily go to the bathroom to relieve myself, such as after an almost two-hour court hearing, there is invariably a guard outside the bathroom waiting for me. I also suspect that the bathroom is inspected after I leave. Of course, when I am in the courtroom, appearing before the Court, there is always a guard present, usually sitting specifically behind me. When I stay longer than momentarily in the clerk's office, such as when I am looking something up on the

clerk's computer, a guard invariably passes by the door and checks on me visually, or, in one case, actually came in and stood right next to me. When I come down to the lobby and exit the elevator, the guards invariably communicate publicly over the radio, within earshot of the public, as before, that I have arrived. Upon belief, false reports of improper or unlawful activity by me have been generated and circulated.

3. As I said in the Complaint, there was one instance in which a guard prevented me from going to the U.S. Attorney's Office to hand-deliver service in a case, even though I had done so many times before. This instance was due to the special treatment I am given – as admitted by the guard himself.

4. The guards' treatment of me is contrary to and substantially different than that which I have observed them accord other attorneys and other non-attorney members of the public.

5. The guards' treatment of me has deterred, and continues to deter, me from visiting the Courthouse for court business and public access, and from engaging in protected speech. It also has caused and continues to cause me humiliation and anxiety, and harm to my reputation.

6. **Specifically, although I continue to visit the Courthouse in furtherance of my pending civil cases, there have been numerous times when I would otherwise have gone to the Courthouse in furtherance of my cases, such as to look up something on the clerk's public access computer, or in furtherance of my legal education such as to watch a trial or hearing or just randomly review court**

filings, but decided not to because of the humiliation and anxiety of the guards' special treatment.

7. **Specifically, as any law-abiding, upright citizen and attorney would, I feel humiliation and anxiety because of the guards' treatment. I dread having to go to the Courthouse when I cannot avoid it. My reputation is also harmed by the special treatment, because other members of the public, including other attorneys, are made aware of it. I also am chilled from seeking legal work from prospective clients or associating with other local attorneys because of the special treatment.**

8. **The special treatment also chills my protected speech with regard to criticism of government. I live in constant fear, now, that my legitimate, peaceful, and lawful criticism of any government will lead to adverse law enforcement action, and thus I have toned down or foregone my criticism in some instances.**

9. The preceding statements are true to the best of my knowledge, information, and belief.

/s/ James E. Pietrangelo, II
JAMES E. PIETRANGELO, II

Sworn to and subscribed before me on May 8, 2006.

/s/ Kelly J. Dorman
NOTARY PUBLIC

KELLY J. DORMAN
Notary Public, State of Vermont
My Commission
Expires Feb. 10, 2007